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8 HK Grace Building, LLC; Crystal Waterfalls,
LLC; and Huntington Giant Capital
9 Corporation

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION
12

13 JD BROTHERS LLC, a California Limited
14 Liability Company,

15 Plaintiff,

16 v.

17 LIBERTY ASSET MANAGEMENT
CORPORATION, NORTH AMERICA
18 ASSET MANAGEMENT
CORPORATION, NORTH AMERICA
19 CAPITAL, LLC, NORTH AMERICA
HOLDING CORPORATION,
20 BENJAMIN KIRK aka BENNY KO aka
TZU PING KO, LUCY GAO aka XIANG
21 XIN GAO, SUNSHINE VALLEY, LLC,
HK GRACE BUILDING, LLC,
22 CRYSTAL WATERFALLS, LLC,
HUNTINGTON GIANT CAPITAL
23 CORPORATION, and DOES 1-100,

24 Defendants.
25
26
27
28

Case No. 3:15-cv-01373

**LUCY GAO, HK GRACE BUILDING
LLC, CRYSTAL WATERFALLS LLC,
AND HUNTINGTON GIANT
CAPITAL CORPORATION'S NOTICE
OF MOTION AND MOTION TO
DISMISS COMPLAINT**

**[FRCP Rules 9(b) and 12(b)(6); 15
U.S.C. § 78u-4(b)]**

**(Declination to Magistrate Judge
Jurisdiction Concurrently Filed
Herewith)**

**Date: July 16, 2015
Time: 9:30 a.m.
Courtroom: TBA**

Complaint Filed: March 25, 2015

Trial Date: None Set

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on July 16, 2015, at 9:30 a.m. (or at a date and time
4 to be set by the Court) in a Courtroom to be announced¹ at the above-captioned Court,
5 which is located at 450 Golden Gate Avenue, 15th Floor, San Francisco, California 94102,
6 Defendants Lucy Gao, HK Grace Building, LLC, Crystal Waterfalls, LLC, and Huntington
7 Giant Capital Corporation (collectively, the “Moving Defendants”) will and hereby do
8 move, both collectively and individually, for an order pursuant to FRCP Rules 9(b) and
9 12(b)(6), and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78, *et seq.*,
10 dismissing, without leave to amend, Plaintiff JD Brothers LLC’s (“Plaintiff”) Complaint
11 because Plaintiff fails to assert material allegations of fact sufficient to state any of the
12 purported causes of action (First through Twelfth).

13 This motion will be based on this Notice of Motion and Motion to Dismiss, the
14 Memorandum of Points and Authorities, the papers and records on file herein, and on such
15 oral and documentary evidence as may be presented at the hearing on the motion.

16 Dated: May 18, 2015

17 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

18
19 By /s/ Charles L. Kreindler
20 CHARLES L. KREINDLER

21 Attorneys for Lucy Gao (erroneously sued herein
22 as “Lucy Gao aka Xiang Xin Gao”); HK Grace
23 Building, LLC; Crystal Waterfalls, LLC; and
24 Huntington Giant Capital Corporation

25
26 ¹ As Moving Defendants decline magistrate judge jurisdiction, the Courtroom in
27 which this Motion will be heard cannot be determined until the action is assigned to
28 a district court judge.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 What is clear from Plaintiff JD Brothers LLC's Complaint is that Plaintiff believes
 4 that it fell victim to one or more fraudulent schemes that separated it from millions of
 5 dollars. The Complaint dedicates ample space to recounting how Plaintiff was allegedly
 6 "induced" time after time to invest in real estate with the various defendants to this action
 7 ("Defendants"). What is not so clear, however, is what moving Defendants Lucy Gao, HK
 8 Grace Building, LLC ("HK Grace"), Crystal Waterfalls, LLC ("Crystal Waterfalls"), and
 9 Huntington Giant Capital Corporation ("Huntington") (collectively "Moving Defendants")
 10 had to do with Plaintiff's alleged injuries. Stripped of its unsubstantiated conclusions (of
 11 which there are many), the Complaint says next to nothing about the Moving Defendants.
 12 In fact, the Complaint mentions the names of two of the Moving Defendants (Crystal
 13 Waterfalls and Huntington) only one time each – in identical, successive paragraphs that
 14 offer only conclusory allegations. The only specific act that the Complaint can attribute to
 15 Ms. Gao is that a certain grant deed was signed by her, although no details whatsoever are
 16 provided about the signing. The only specific acts that the Complaint can attribute to HK
 17 Grace are that it purchased a building with Plaintiff's money (and Plaintiff's consent) and
 18 issued a K-1 that Plaintiff suspects is inaccurate, although Plaintiff stops well short of
 19 converting this suspicion into actionable conduct. As such, the Moving Defendants are left
 20 to guess at how they could have contributed to Plaintiff's alleged injuries, much less
 21 actively participated in the alleged fraud on which the Complaint relies.

22 The Court, however, need not and should not engage in such guessing. Federal
 23 Rule of Civil Procedure 9(b) requires plaintiffs to substantiate their accusations of fraud
 24 with specific *facts* so that defendants are adequately notified of the wrongful acts they
 25 allegedly committed and no guesswork is needed. Empty conclusions are insufficient.
 26 Further, where, as here, a plaintiff complains of a unified course of allegedly fraudulent
 27 behavior, Rule 9(b) applies to all causes of action "sounding in fraud" (i.e., arising from
 28 the alleged fraudulent scheme) whether or not the plaintiff styles them as such. The

present Complaint does not come close to meeting these requirements with respect to the Moving Defendants. Accordingly, the Court should dismiss the Complaint in its entirety as to them.

II. STATEMENT OF ISSUES TO BE DECIDED (L.R. 7-4)

The Motion raises the following issue for decision with respect to each of the Moving Defendants: whether Plaintiff has alleged material allegations of fact sufficient to state any of the Complaint's purported causes of action (First through Twelfth).

III. SUMMARY OF RELEVANT ALLEGATIONS

In essence, Plaintiff claims that it was tricked by Defendants to invest large sums of money in furtherance of several transactions related to real estate, which Defendants have used to enrich themselves to Plaintiff's detriment. Defendants' *coup de grace*, according to the Complaint, was their sale of a commercial building (to which Plaintiff allegedly holds an ownership claim) and retention of the resulting profits. Despite grandly declaring that its Complaint "describes what can only be described as a Ponzi scheme orchestrated by Defendants,"² Plaintiff's allegations related to the Moving Defendants are *de minimis*.

A. Allegations Related to Moving Defendant Lucy Gao

The section of the Complaint titled "The Parties" attempts to explain the relationships between Defendants. The majority of the allegations involving Ms. Gao appear in this section, which alleges that Ms. Gao "controls," "owns," and/or "operates" to varying degrees the following defendant entities: Liberty Asset Management Corporation ("Liberty"), North America Asset Management Corporation, North America Capital LLC, North America Holding Corporation, Sunshine Valley LLC, HK Grace, Crystal Waterfalls, and Huntington. (¶¶ 8-11, 14-17)³. Plaintiff further alleges that Ms. Gao "is the treasurer and/or CFO of Liberty" and "has control over the finances of Liberty." (¶ 13). The

² Complaint, ¶ 1.

³ Unless otherwise noted, all citations in this Section are to the Complaint.

1 Complaint offers no additional information to substantiate Ms. Gao's alleged relationship
 2 with these entities. To the contrary, Plaintiff contradicts its allegation that Ms. Gao
 3 "owns" HK Grace by subsequently alleging that "Defendant Lucy Gao was never a
 4 member of HK Grace Building LLC." (§ 66).

5 The section of the Complaint titled "Factual Background" alleges in conclusory
 6 fashion that Ms. Gao "diverted" money that Plaintiff had transferred to Liberty for her own
 7 personal use or the use of "[her] legal entities" Crystal Waterfalls and Huntington. (§§ 13,
 8 32, and 34). This section also alleges that Ms. Gao signed a certain grant deed as the
 9 managing member of HK Grace that transferred title to a property located at 166 Geary
 10 Street, San Francisco (the "Geary Street Property") from HK Grace to (presumably) a
 11 different owner. (§ 66). According to the Complaint, Ms. Gao was never a member of HK
 12 Grace. (*Id.*).

13 **B. Allegations Related to Moving Defendant HK Grace**

14 Plaintiff alleges that HK Grace "was formed as a LLC to induce Plaintiff to invest
 15 in [the Geary Street Property]." (§ 15). HK Grace also allegedly purchased the Geary
 16 Street Property "using \$18 million in cash (\$8 million from Plaintiff, \$2 million from The
 17 Guo/Huang Family Trust, and \$8 million from Liberty/Sunshine Valley, LLC), and a \$18
 18 million dollar mortgage." (§ 63). Lastly, the Complaint alleges that, despite Plaintiff's
 19 belief that "[the Geary Street Property] was sold to HK Grace with all tenants in place to
 20 pay rent at market rates," HK Grace "sent out a K-1 for 2012 to Plaintiff showing a loss of
 21 \$10,900 in rental income." (§ 72).

22 **C. Allegations Related to Moving Defendants Crystal Waterfalls and** 23 **Huntington**

24 The Complaint makes identical conclusory allegations against Crystal Waterfalls
 25 and Huntington. In successive paragraphs, the Complaint alleges based on Plaintiff's
 26 information and belief that these entities "received stolen property from Plaintiff's
 27 investment and equity in [the Geary Street Property]." (§§ 16-17). Plaintiff subsequently
 28 contradicts these allegations by admitting that it "brings this action against all Defendants

1 to recover the \$10.656 million in profits on the sale of [the Geary Street Property]”
 2 because “[it] is unaware to which entities the [funds] [have] been transferred.” (¶ 70).

3 **D. There are No Other Allegations Involving the Moving Defendants**

4 Other than those discussed above, the Complaint makes no other allegations of fact
 5 regarding the Moving Defendants, although it does make numerous conclusory allegations
 6 against unspecified “Defendants.” (*See, e.g.*, ¶ 39).

7 **E. Causes of Action Against the Moving Defendants**

8 Based on the foregoing allegations, Plaintiff asserts that it is entitled to legal and
 9 equitable relief against all of the Moving Defendants under the following theories of
 10 liability: Violation of Section 12 of the Securities Act of 1933 (First Cause of Action);
 11 Violation of Section 10(B) of the Securities Exchange Act of 1934 (Second Cause of
 12 Action); Violations of the Racketeer Influenced and Corrupt Organizations Act (Third
 13 Cause of Action); Fraud (Fourth Cause of Action); Breach of Fiduciary Duty (Fifth Cause
 14 of Action); Conversion (Sixth Cause of Action); Violation of California Penal Code § 496
 15 – Receiving Stolen Property (Eighth Cause of Action); Unjust Enrichment (Ninth Cause of
 16 Action); Unfair Business Practice in Violation of California Business and Professions
 17 Code §§ 17200 and 17500 (Tenth Cause of Action); Fraudulent Transfer (Eleventh Cause
 18 of Action); and Interference with Prospective Economic Advantage (Twelfth Cause of
 19 Action). In addition, Plaintiff asserts a cause of action for Breach of Contract against
 20 Moving Defendant HK Grace (Seventh Cause of Action).

21 **IV. ARGUMENT**

22 **A. Legal Standard**

23 A motion under FRCP Rule 12(b)(6) tests the sufficiency of the complaint.⁴
 24 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). “To survive a motion to dismiss, a

26 ⁴ Pursuant to FRCP Rule 10(c), “[a] copy of a written instrument that is an exhibit to
 27 a pleading is a part of the pleading for all purposes.” Under this rule, a contract can
 28 properly be incorporated into a complaint and considered for purposes of a FRCP

1 complaint must contain sufficient factual matter, accepted as true, to state a claim to relief
 2 that is plausible on its face.” *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013),
 3 quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). A
 4 claim is facially plausible “when the plaintiff pleads factual content that allows the court to
 5 draw the reasonable inference that the defendant is liable for the misconduct alleged.”
 6 *Iqbal*, 556 U.S. at 678. “The plausibility standard requires more than the sheer possibility
 7 or conceivability that a defendant has acted unlawfully.” *Salameh v. Tarsadia Hotel*, 726
 8 F.3d 1124, 1129 (9th Cir. 2013). “Where a complaint pleads facts that are merely
 9 consistent with a defendant’s liability, it stops short of the line between possibility and
 10 plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 678 (citation and internal quotation
 11 marks omitted). “[B]are assertions” are insufficient. *Id.* at 681; *see also Coto Settlement*
 12 *v. Eisenberg*, 593 F.3d 1031, 1034 (9th Cir. 2010). Courts “discount[] conclusory
 13 statements, which are not entitled to the presumption of truth, before determining whether
 14 a claim is plausible.” *Chavez v. U. S.*, 683 F.3d 1102, 1108 (9th Cir. 2012).

15 RICO and fraud claims, including securities fraud, are subject to FRCP Rule 9(b)’s
 16 heightened pleading standard. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir.
 17 2004) (RICO); *In re Autodesk, Inc. Sec. Litig.*, 132 F.Supp.2d 833, 839 (N.D. Cal. 2000)
 18 (securities fraud). The Private Securities Litigation Reform Act (“PSLRA”) also requires
 19 that “the complaint shall specify each statement alleged to have been misleading, the
 20 reason or reasons why the statement is misleading, and, if an allegation regarding the
 21 statement or omission is made on information and belief, the complaint shall state with
 22 particularity all facts on which that belief is formed.” 15 U.S.C. §78u-4(b)(1). And where,
 23 as here, several defendants are sued in connection with an alleged fraudulent scheme, the
 24 plaintiff must “inform each defendant separately of the allegations surrounding his alleged
 25 participation in the fraud.” *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007).

26
 27 Rule 12(b)(6) motion. *Dichter-Mad Family Partners, LLP v. U.S.*, 709 F.3d 749,
 28 755 (9th Cir. 2013).

1 **B. The Entire Complaint Fails as a Matter of Law as to the Moving**
 2 **Defendants**

3 Although Plaintiff contends that all of the Moving Defendants are liable to it under
 4 eleven of the Complaint’s twelve causes of action (and HK Grace is liable under all
 5 twelve), Plaintiff fails to allege virtually any *facts* demonstrating that any of the Moving
 6 Defendants did *anything*. Plaintiff’s boilerplate and wholly unsupported agency, alter ego,
 7 and acting in concert allegations (*see* Complaint, ¶¶ 19-20) do not overcome its failure to
 8 allege specific facts regarding the Moving Defendants. *See In re Toyota Motor Corp.*, 785
 9 F.Supp.2d 883, 911 (C.D. Cal. 2011) (civil RICO action; striking plaintiffs’ “boilerplate
 10 cross-authority/cross-agency/ratification allegations” because such “allegations must be
 11 supportable by something more than mere conclusory allegations of mutual and
 12 overlapping agencies pursuant to which Defendants at all time [sic] acted”). As a result of
 13 the dearth of factual allegations against the Moving Defendants, the Complaint fails to
 14 state any claim against any of them. The Complaint should therefore be dismissed.

15 **1. The Complaint Fails to State a Cause of Action for Fraud Against**
 16 **Any of the Moving Defendants**

17 “The elements of fraud, which give rise to the tort action for deceit, are (a)
 18 misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of
 19 falsity (or ‘scienter’); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance;
 20 and (e) resulting damage.” *Lazar v. Superior Court*, 12 Cal.4th 631, 638 (1996) (internal
 21 citations omitted). FRCP Rule 9(b) requires that each of these elements be pled with
 22 specificity. Further, when pleading fraud against business entity defendants, Rule 9(b)
 23 “requires the plaintiff to allege the names of the persons who made the allegedly fraudulent
 24 representations, their authority to speak, to whom they spoke, what they said or wrote, and
 25 when it was said or written.” *Tarmann v. State Farm Mut. Auto Ins. Co.*, 2 Cal.App.4th
 26 153, 157 (1991); *accord T & M Solar and Air Conditioning, Inc. v. Lennox International*
 27 *Inc.*, -- F.Supp.3d --, 2015 WL 1289497, *17 (N.D.Cal. 2015).

28 Plaintiff has failed to state a cause of action for fraud against any of the Moving
 Defendants. With respect to Ms. Gao, the only plausible misrepresentation alleged in the

1 Complaint is that she signed a grant deed as the managing member of HK Grace when,
2 according to Plaintiff, she did not hold that position. Missing from the Complaint,
3 however, are any facts showing that (1) Ms. Gao knew that she was not the managing
4 member of HK Grace; (2) Ms. Gao intended to defraud Plaintiff by signing the deed; or (3)
5 that Plaintiff justifiably relied on Ms. Gao's signature. To the contrary, given the
6 Complaint's lack of factual allegations regarding Ms. Gao, it is equally, if not more
7 plausible, that (1) she believed she was the managing member of HK Grace; (2) she was
8 completely unaware of Plaintiff's alleged interest in HK Grace; and (3) the only parties, if
9 any, that relied on her signature were the transferee and the clerk who recorded the deed.
10 Notably, the Complaint does not allege that Ms. Gao was in any way involved with the
11 various investments that led to Plaintiff's claimed interest in HK Grace. Therefore, the
12 Complaint fails to state a fraud claim against Ms. Gao.

13 Regarding HK Grace, the only plausible misrepresentation alleged in the Complaint
14 is that the entity issued a "false" K-1 showing an operating loss for 2012. Even if the
15 Court excuses Plaintiff's failure to identify *who* issued the K-1 on behalf of HK Grace, the
16 Court should nonetheless require Plaintiff to allege facts demonstrating *why* the K-1 was
17 false. *Lennox International Inc.*, 2015 WL 1289497, *16 (when the complaint highlights a
18 particular statement as false, it must also set forth what is false or misleading about a
19 statement, and why it is false). Here, Plaintiff has done nothing more than speculate that
20 the K-1 was incorrect because Plaintiff believes that HK Grace was collecting rental
21 income in 2012 and unspecified "Defendants" offered to issue a K-1 showing that HK
22 Grace generated profit in 2013 (which is irrelevant to HK Grace's financial performance in
23 2012). (Complaint, ¶¶ 72-73). Assuming their truth, these allegations, which ignore HK
24 Grace's operating expenses for 2012, do not foreclose the likelihood that HK Grace had an
25 operating loss that year. Therefore, the Complaint fails to state a fraud claim against HK
26 Grace.

1 The Complaint does not attribute any statement, let alone misrepresentation, to
2 Crystal Waterfalls or Huntington and, therefore, fails to state a claim for fraud against
3 them as well.

4 **2. The Complaint Fails to State a Cause of Action for Violation of**
5 **The Securities Exchange Act of 1934 Against Any of the Moving**
6 **Defendants**

6 Plaintiff asserts that its Complaint states a claim under Section 10(b) of the
7 Securities Exchange Act of 1934 and Rule 10b-5 thereunder. (Complaint, ¶ 99). To do so,
8 Plaintiff must allege (a) a misrepresentation or omission; (b) of material fact; (c) made
9 with scienter; (d) on which Plaintiff justifiably relied; (e) that proximately caused the
10 alleged loss. *Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999). Plaintiffs have long
11 been required to plead securities fraud with the specificity required under FRCP Rule 9(b).
12 In addition, plaintiffs must now satisfy the PSLRA, which requires both falsity and
13 scienter to be pled with particularity to put an end to the practice of pleading “fraud by
14 hindsight.” *In re Silicon Graphics, Inc.*, 183 F.3d 970, 988 (9th Cir. 1999).

15 As discussed above, Plaintiff has failed to allege sufficient facts to state a claim for
16 common law fraud, much less securities fraud. Moreover, the few representations that the
17 Complaint attributes to the Moving Defendants (i.e., Ms. Gao’s signature on the deed and
18 HK Grace’s issuance of a K-1) occurred *after* Plaintiff allegedly purchased the “securities”
19 at issue, thereby negating causation. Accordingly, the Complaint’s cause of action for
20 securities fraud fails.

21 **3. The Complaint Fails to State a Cause of Action for Violation of**
22 **The Securities Act of 1933 Against Any of the Moving Defendants**

23 Plaintiff also asserts that its Complaint states claims under Section 12(a)(1) and
24 Section 12(a)(2) of the Securities Act of 1933. (Complaint, ¶¶ 82, 87). These claims are
25 separately addressed below.

26 **a. Plaintiff Fails to State a Claim Under Section 12(a)(1)**

27 Section 12(a)(1) provides that any person who “offers or sells a security in violation
28 of section 77e of this title [Section 5 of the 1933 Act] ... shall be liable to the person

1 purchasing such security from him.” 15 U.S.C. § 77l(a). Liability as a “seller” under the
 2 statute applies to those who pass title to a security or those who solicit the purchase of a
 3 security when motivated by financial gain. *Pinter v. Dahl*, 486 U.S. 622, 646–47 (1988).
 4 Accordingly, to state a claim under Section 12(a)(1), a plaintiff must allege, among other
 5 elements, that the defendant passed title to, or solicited the purchase of, an unregistered
 6 security.

7 Plaintiff fails to allege a violation of this Section with respect to any of the Moving
 8 Defendants. None of the Moving Defendants are alleged to have passed title to a
 9 “security” to Plaintiff. Further, none of the alleged statements attributed to the Moving
 10 Defendants qualify as solicitations to purchase a “security” because they occurred *after*
 11 Plaintiff’s purchase. Therefore, the Complaint fails to state a claim under Section 12(a)(1)
 12 of the Securities Act of 1933 against any of the Moving Defendants.

13 **b. Plaintiff Fails to State a Claim under Section 12(a)(2)**

14 “To prevail under [Section] 12(a)(2), a plaintiff must demonstrate: “(1) an offer or
 15 sale of a security, (2) by the use of a means or instrumentality of interstate commerce, (3)
 16 by means of a prospectus or oral communication, (4) that includes an untrue statement of
 17 material fact or omits to state a material fact that is necessary to make the statements not
 18 misleading.” *Mallen v. Alphatec Holdings, Inc.*, 861 F.Supp.2d 1111, 1123
 19 (S.D.Cal. 2012) quoting *Miller v. Thane Int’l, Inc.*, 519 F.3d 879, 885 (9th Cir. 2008).
 20 Where, as here, the complaint “sounds in fraud” because it employs the exact same
 21 allegations to allege violations of Section 12 as it uses to allege fraudulent conduct under
 22 Section 10(b) of the Securities Exchange Act of 1934, a claim under Section 12(a)(2) must
 23 be pled with increased particularity under FRCP Rule 9(b). *Mallen*, 861 F.Supp.2d at
 24 1123-1124; *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009).

25 As discussed above, the Complaint does not attribute any statements to Crystal
 26 Waterfalls or Huntington. The alleged statements Plaintiff attributes to Ms. Gao and HK
 27 Grace were unrelated to any “security” and occurred after Plaintiff’s purchase.
 28 Accordingly, the Complaint fails to state a claim under Section 12(a)(2).

c. **Plaintiff Fails to Allege Control Person Liability**

A “plaintiff basing allegations on ‘control person’ status must inform the defendants who they are alleged to control and what acts or status indicate such control.” *Wanetick v. Mel’s of Modesto*, 811 F.Supp. 1402, 1407 (N.D.Cal. 1992). This requires, at minimum, allegations of fact “sufficient to presume control over the transactions giving rise to the alleged securities violation,” including “whether the person managed the company on a day-to-day basis and was involved in the [representations at issue].” *S.E.C. v. Todd*, 642 F.3d 1207, 1223 (9th Cir. 2011). “The fact that a person is a CEO of other high-ranking officer within a company does not create a presumption that he or she is a ‘controlling person,’” and “[m]ere titles are not adequate indicators of control authority.” *Id.*; *Wanetick*, 811 F.Supp. at 1407.

Plaintiff has failed to meet these requirements. Nowhere does the Complaint allege that HK Grace, Crystal Waterfalls, or Huntington control any individual or entity. In addition, the Complaint’s conclusory “control” allegations against Ms. Gao are insufficient to establish control person liability. Plaintiff’s assertions that Ms. Gao is Liberty’s “treasurer and/or CFO” and “has control over the finances of Liberty” likewise fail to establish that Ms. Gao was Liberty’s control person. As noted above, Ms. Gao’s alleged title does not create a presumption of control. Further, the conclusory assertion that Ms. Gao controls Liberty’s finances does not create the reasonable inference that she was involved in any way with the conduct giving rise to the securities laws violations alleged in the Complaint, i.e., the offer or sale of “securities.” Plaintiff does not provide any facts to explain Ms. Gao’s alleged job duties as “treasurer and/or CFO.” However, based on those terms’ common usage, it seems more likely than not that Ms. Gao, were she Liberty’s treasurer and/or CFO, would focus her attention on Liberty’s internal finances, and leave the marketing and sale of “securities” to others. Therefore, Plaintiff has failed to state a claim for violation of Section 12 under a control person theory of liability against any of the Moving Defendants.

1 **4. The Complaint Fails to State a Cause of Action for Violation of**
2 **California Penal Code Section 496 Against Any of the Moving**
3 **Defendants**

4 California Penal Code Section 496 makes punishable the knowing receipt or
5 purchase of property “that has been obtained in any manner constituting theft.” Cal. Pen.
6 Code § 496, subd. (a); *See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith,*
7 *Inc.*, 68 Cal.App.4th 445, 485 (1998). The definition of “theft” appears in California Penal
8 Code Section 484, which states, in pertinent part, that

9 [e]very person who shall feloniously steal, take, carry, lead, or
10 drive away the personal property of another, or shall
11 fraudulently appropriate property which has been entrusted to
12 him or her, or who shall knowingly and designedly, by any
13 false or fraudulent representation or pretense, defraud any other
14 person of money ... is guilty of theft.

15 In other words, for Plaintiff to state a claim under Section 496, it must plead the
16 knowing receipt of property obtained through fraud. Plaintiff does not allege that Ms. Gao
17 or HK Grace received stolen property and, for the reasons discussed above, the Complaint
18 fails to allege fraud against them. Accordingly, the Complaint fails to state a claim for
19 receiving stolen property against Ms. Gao and HK Grace.

20 Plaintiff does claim that Crystal Waterfalls and Huntington received stolen
21 property. However, the Court can ignore this allegation based on Plaintiff’s subsequent
22 admission that it has no idea to whom or what its allegedly stolen money was transferred.⁵
23 *See Bender v. Suburban Hosp., Inc.*, 159 F. 3d 186, 192 (4th Cir. 1998) (noting that “while
24 notice pleading does not demand that a complaint expound the facts, a plaintiff who does
25 so is bound by such exposition”). Even if this contradiction is excused, Plaintiff alleges no
26 facts demonstrating that Crystal Waterfalls and Huntington knew that the property they
27 received was stolen. Therefore, the Complaint also fails to state a claim for receiving
28 stolen property against Crystal Waterfalls and Huntington.

29 ⁵ Complaint, ¶ 70.

1 **5. The Complaint Fails to State a Cause of Action for Fraudulent**
2 **Transfer Against Any of the Moving Defendants**

3 California’s Uniform Fraudulent Transfer Act recognizes two varieties of
4 “fraudulent transfer” – one that renders the transferor insolvent (Cal. Civil Code
5 § 3439.05) and one that does not (Cal. Civil Code § 3439.04). Although Plaintiff does not
6 specify under which code section its claim for “fraudulent transfer” allegedly arises,
7 Plaintiff must be relying on Section 3439.04 since the Complaint does not allege that any
8 Defendant has become insolvent as a result of a transfer. Accordingly, FRCP Rule 9(b)
9 applies. *Bond Safeguard Ins. Co. v. Kramer*, 2015 WL 1021444, *1 (E.D.Cal. 2015); *see*
10 *Kelleher v. Kelleher*, 2014 WL 94197, *5–*6 (N.D.Cal. Jan. 9, 2014); *Sunnyside Dev. Co.*
11 *LLC v. Cambridge Display Tech. Ltd.*, 2008 WL 4450328, *6, *8–*9 (N.D.Cal. Sept. 29,
12 2008).

13 Section 3439.04 defines a “fraudulent transfer” as follows:

14 [a] transfer made or obligation incurred by a debtor is a
15 fraudulent as to a creditor ... if the debtor made the transfer or
16 incurred the obligation ... [1] [w]ith actual intent to hinder,
17 delay, or defraud any creditor of the debtor [or] [2] without
18 receiving a reasonably equivalent value in exchange for the
19 transfer or obligation, and the debtor either [a] [w]as engaged
20 or was about to engage in a business or a transaction for which
21 the remaining assets of the debtor were unreasonably small in
22 relation to the business or transaction [or] [b] [i]ntended to
23 incur, or believed or reasonably believed that he or she would
24 incur, debts beyond his or her ability to pay as they became
25 due.

26 The Complaint fails to allege that any of the Moving Defendants transferred
27 anything with the intent of withholding the transferred property from Plaintiff. At most,
28 Plaintiff asserts the Ms. Gao signed a grant deed related to the Geary Street Property and
29 that unspecified “Defendants” transferred funds from HK Grace “into their own names.”
30 (Complaint, ¶¶ 66 and 70). Neither of these allegations are pled with the specificity
31 required under Rule 9(b). As for Ms. Gao, the Complaint does not explain how or why she
32 was aware of Plaintiff’s alleged interest in the Geary Street Property – facts necessary to
33 show she intended to “hinder, delay, or defraud” Plaintiff. Further, Rule 9(b) requires that
34 Plaintiff explain what each Moving Defendant did individually in relation to the alleged

1 fraudulent transfer, which the Complaint fails to do. *See Swartz*, 476 F.3d at 764-65.

2 Therefore, the Complaint fails to state a claim for fraudulent transfer.

3 **6. The Complaint Fails to State a Cause of Action for Conversion**
 4 **Against Any of the Moving Defendants**

5 The elements for a cause of action for conversion are: “(1) the plaintiff's ownership
 6 or right to possession of the property; (2) the defendant's conversion by a wrongful act or
 7 disposition of property rights; and (3) damages.” *Mendoza v. Rast Produce Co, Inc.*, 140
 8 Cal.App.4th 1395, 1404-1405 (2009) (internal quotations omitted). FRCP Rule 9(b)’s
 9 heightened pleading standard applies to Plaintiff’s claim for conversion because it is based
 10 on the same unified course of conduct that allegedly supports its various fraud claims. *See*
 11 *Fields v. Wise Media, LLC*, 2013 WL 3187414, *3 (N.D.Cal. 2013).

12 Plaintiff has failed to state a claim for conversion against any of the Moving
 13 Defendants. Viewed through the lens of FRCP Rule 9(b), the Complaint does not allege
 14 any conduct against the Moving Defendants that approaches a “wrongful act or disposition
 15 of property rights.” As discussed above, the Complaint fails to allege any facts to establish
 16 that Crystal Waterfalls and Huntington’s alleged receipt of “stolen” property was
 17 wrongful. Likewise, as also addressed above, the Complaint fails to allege any facts
 18 demonstrating that Ms. Gao’s alleged signing of the grant deed was anything other than
 19 innocent. The Complaint does not allege that HK Grace did anything with Plaintiff’s
 20 property other than purchase a building, an act specifically approved by Plaintiff.
 21 (Complaint, ¶¶ 62-64). Lastly, Plaintiff’s conclusory allegations that Ms. Gao and other
 22 unspecified “Defendants” “diverted” or “converted” Plaintiff’s property are insufficient.
 23 Therefore, the Complaint fails to state a cause of action for conversion against the Moving
 24 Defendants.

25 **7. The Complaint Fails to State a Cause of Action for Intentional**
 26 **Interference With Prospective Economic Advantage Against Any**
 27 **of the Moving Defendants**

28 To state a claim for intentional interference with prospective economic advantage, a
 plaintiff must plead facts demonstrating: “(1) an economic relationship between the

1 plaintiff and some third party, with the probability of some future economic benefit to the
 2 plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part
 3 of the defendant designed to disrupt the relationship; (4) actual disruption of the
 4 relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the
 5 defendant." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1154 (2003).

6 Plaintiff does not plead *any* facts necessary to support this cause of action.
 7 Although the Complaint identifies a handful of third parties, e.g., Jimmy Guo, Derek Guo,
 8 Wendy Huang, and their combined family trust (Complaint, ¶¶ 7 and 52), Plaintiff makes
 9 no attempt to allege an economic relationship between itself and these parties, much less
 10 one with the probability of some future success. Further, the Complaint alleges no facts
 11 indicating that any of the Moving Defendants were aware of the third parties' existence.
 12 Accordingly, the Complaint fails to state a claim for intentional interference with
 13 prospective economic advantage against the Moving Defendants.

14 **8. The Complaint Fails to State a Cause of Action for Breach of**
 15 **Fiduciary Duty Against Any of the Moving Defendants**

16 "The elements of breach of fiduciary duty are the existence of a fiduciary
 17 relationship, its breach, and damage proximately caused by that breach. There must be an
 18 adequate showing of each of these elements in order to plead a cause of action for breach
 19 of fiduciary duty." *Yamauchi v. Cotterman*, -- F.Supp.3d --, 2015 WL 1346885, *13
 20 (N.D.Cal. 2015) (citing California authorities). Where, as here, a claim for breach of
 21 fiduciary duty relies on allegations that "sound in fraud," FRCP Rule 9(b) applies. *See In*
 22 *re Accuray, Inc. Shareholder Derivative Litigation*, 757 F.Supp.2d 919, 934 (N.D.Cal.
 23 2010).

24 Plaintiff has failed to plead a cause of action for breach of fiduciary duty against
 25 any of the Moving Defendants. The Complaint alleges that unspecified "Defendants"
 26 owed Plaintiff a fiduciary duty (1) to "keep Plaintiff's money [invested with Liberty] in an
 27 investment account," and (2) "in their capacities as managers of HK Grace Building
 28 LLC[,] ... [to not] divert the profits of the sale of [the Geary Street Property]."

(Complaint, ¶¶ 135-136). However, the Complaint does not allege any facts with the specificity required under FRCP Rule 9(b) to establish that any individual Moving Defendant owed a fiduciary duty to Plaintiff. To the contrary, none of the Moving Defendants are party to the agreements under which Plaintiff allegedly transferred money to “Defendants.”

Even if the Complaint did set forth sufficient facts to establish the existence of duties running from the Moving Defendants to Plaintiff, as discussed above, there are no factual allegations against the Moving Defendants amounting to breaches of those duties. Therefore, the Complaint fails to state a claim for breach of fiduciary duty.

9. The Complaint Fails to State a Cause of Action for Breach of Contract Against HK Grace

The elements of a cause of action for breach of contract are “(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.” *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 821 (2011).

The Complaint’s allegations do not satisfy these elements with respect to HK Grace and therefore fail to state a cause of action for breach of contract. As a threshold matter, although Plaintiff asserts that HK Grace breached its Operating Agreement and the amendment thereto (Complaint, ¶¶ 153-155), the exhibits attached to the Complaint, which trump Plaintiff’s allegations to the contrary, show that HK Grace is not a party to that contract. *Sprewell v. Golden State Warriors*, 266 F3d 979, 988 (9th Cir. 2001) (“[t]he court need not ... accept as true allegations that contradict matters properly subject to judicial notice or by exhibit”). The preamble to the Operating Agreement of HK Grace LLC states that the Agreement is “by, between, and among the undersigned,” who are identified on the Agreement’s signature page as: “JD Brothers LLC,” “Sun Valley Management, LLC” and “HK Grace *Manager*, LLC.” (Exhibit J to Complaint, pp. 2 and 10) (emphasis added). The first paragraph of the Amendment to Operating Agreement of HK Grace Building LLC states: “[t]his is an amendment ... between members of JD Brothers LLC and

1 Sunshine Valley Management LLC.” (Exhibit K to Complaint, p. 2). Thus, HK Grace
 2 *Building* LLC is not a party to either contract, and Plaintiff’s cause of action for breach of
 3 contract against it fails.⁶

4 **10. Plaintiff’s Allegations Against the Moving Defendants Do Not**
 5 **Support a RICO Cause of Action**

6 It appears that Plaintiff is attempting to assert a violation of 18 U.S.C. §1962(c)
 7 against the Moving Defendants. (Complaint, ¶¶ 102-123). Subsection 1962(c) provides:

8 It shall be unlawful for any person employed by or associated
 9 with any enterprise engaged in, or the activities of which
 10 affect, interstate or foreign commerce, to conduct or
 participate, directly or indirectly, in the conduct of such
 enterprise’s affairs through a pattern of racketeering activity or
 collection of unlawful debt.

11 Accordingly, Plaintiff must allege the following elements: “(1) conduct (2) of an
 12 enterprise (3) through a pattern (4) of racketeering activity (known as ‘predicate acts’) (5)
 13 causing injury to plaintiff’s ‘business or property.’” *Living Designs, Inc. v. E.I. Dupont de*
 14 *Nemours and Co.*, 431 F.3d 353, 361 (9th Cir. 2005), *quoting Grimm v. Brown*, 75 F.3d
 15 506, 510 (9th Cir. 1996). As previously noted, a RICO claim must be pled with the
 16 specificity required by FRCP Rule 9(b).

17 Here, Plaintiff’s allegations do not come close to satisfying the RICO pleading
 18 requirements as to any of the Moving Defendants. While Plaintiff contends that the
 19 Moving Defendants participated in the predicate acts of “wire fraud” and “financial
 20 institution fraud” (Complaint, ¶ 107), as discussed above, the Complaint fails to allege
 21

22 ⁶ Even if HK Grace were a party to its own Operating Agreement, it could not have
 23 breached it in the manner alleged by Plaintiff, i.e., “by diverting \$10.656 million in
 24 profits away from Plaintiff” and “by failing to give rental income to Plaintiff from
 25 2012 through 2014.” (Complaint, ¶¶ 154-155). Pursuant to the Operating
 26 Agreement, under which the “right to exercise the powers of the Company [HK
 27 Grace] ... is vested entirely in the Operating Manager(s) and Managing Member(s)
 28 by Members as shown in Schedule A,” HK Grace is incapable of acting on its own
 behalf. (Exhibit J to Complaint, § 5.1). Indeed, neither the Operating Agreement
 nor its amendment assign any duty to HK Grace that HK Grace could have
 breached; all such duties are assigned to its “Managers.”

1 fraudulent conduct – or actionable conduct of any kind – against any of the Moving
2 Defendants.

3 Moreover, the kind of fraud that the Complaint is attempting to allege – securities
4 fraud resulting in a “Ponzi” scheme⁷ - cannot support a RICO action. The PSLRA
5 amended Section 1964(c) of the RICO Act, to provide as follows:

6 [N]o person may rely upon any conduct that would have been
7 actionable as fraud in the purchase or sale of securities to
8 establish a violation of section 1962. The exception contained
9 in the preceding sentence does not apply to an action against
10 any person that is criminally convicted in connection with the
11 fraud.

12 18 U.S.C. § 1964(c).

13 This provision precludes a civil RICO claim based on a “Ponzi” scheme that was
14 accomplished by the sale of securities. *Swartz*, 476 F.3d at 761. “(A) plaintiff cannot
15 avoid the RICO Amendment’s bar by pleading mail fraud, wire fraud and bank fraud as
16 predicate offenses in a civil Rico action if the conduct giving rise to those predicate
17 offenses amounts to securities fraud.” *Bald Eagle Area School District v. Keystone*
18 *Financial, Inc.*, 189 F.3d 321, 330 (3rd Cir. 1999). Section 1964(c) is also construed to
19 exclude conduct that constitutes aiding and abetting securities fraud. *Pritikin v. Comerica*
20 *Bank*, 2009 U.S. Dist. LEXIS 112075, at *13014 (N.D. Cal. Nov. 17, 2009). Therefore,
21 even if Plaintiff could establish that the Moving Defendants participated in the “predicate
22 acts” on which the Complaint’s RICO claim is based, the claim would be nonetheless
23 barred by Section 1964(c).

24 **11. The Complaint Fails to State a Cause of Action for Unfair**
25 **Business Practices in Violation of California Business and**
26 **Professions Code §§ 17200 and 17500 Against Any of the Moving**
27 **Defendants**

28 The Complaint alleges that unspecified “Defendants” engaged in “unfair and
deceptive conduct, fraudulent conduct, misrepresentations, omissions, and other tortious

7 Complaint, ¶ 1 (“This action describes what can only be described as a Ponzi
scheme orchestrated by Defendants[.]”).

1 conduct [that] violated California Business and Professions Code Section 17200 and
 2 17500.” (Complaint, ¶ 169). As such, Plaintiff’s cause of action for unfair business
 3 practices sounds in fraud and, therefore, must be pled with particularity pursuant to FRCP
 4 Rule 9(b). *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009).
 5 Additionally, “[a] plaintiff alleging unfair business practices under the unfair competition
 6 statutes ‘must state with reasonable particularity the facts supporting the statutory elements
 7 of the violation.’” *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1316
 8 (N.D.Cal. 1997). As the Complaint offers no specific, factual allegations whatsoever to
 9 substantiate its claims or unfair business practices against the Moving Defendants, this
 10 cause of action also fails.

11 **12. Unjust Enrichment is Not a Valid Cause of Action**

12 Plaintiff’s attempt to plead a cause of action for “unjust enrichment” necessarily
 13 fails as to all Defendants because no such cause of action exists in California. *Ham v.*
 14 *Hain Celestial Group, Inc.*, -- F.Supp.3d --, 2014 WL 4965959, *5 (N.D.Cal. 2014) (citing
 15 and summarizing California and federal authorities).

16 **V. CONCLUSION**

17 For the reasons set forth above, Plaintiff’s Complaint should be dismissed in its
 18 entirety without leave to amend with respect to the Moving Defendants.

19 Dated: May 18, 2015

20 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

21
 22 By /s/ Charles L. Kreindler
 23 CHARLES L. KREINDLER

24 Attorneys for Lucy Gao (erroneously sued herein
 25 as “Lucy Gao aka Xiang Xin Gao”); HK Grace
 26 Building, LLC; Crystal Waterfalls, LLC; and
 27 Huntington Giant Capital Corporation
 28